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PRESIDENT'S PAGE

H. F. Selvin

IT HAS LONG been regarded the duty of every lawyer to render legal assistance to those who, needing that aid, are unable to pay for it.[1] Even in a simpler society, when statutes were few and administrative agencies and regulations even fewer, that duty was known and recognized.

In our complex modern society, with its tremendous expansion of the sphere of government, it is virtually impossible for anyone to go for long without being confronted with some problem to the solution of which is needed the advice of one who is expert in the law. And when that need arises it is no less acute merely because the purse of the individual affected may be empty. If lawyers as a class do not meet the need, government ultimately will. The implications of such an eventuality must be apparent and need not be labored.

In Los Angeles, the Legal Aid Foundation, a non-profit organization deriving its funds from the Community Chest, has admirably served to provide legal services for those unable to employ and pay lawyers from their own funds. The very fact that the Foundation is a Chest agency, however, has, in conjunction with the great increase of our population, created for it a serious financial problem. The Foundation may not solicit or accept funds for its operating expenses from sources outside the Chest. But its allotment from the Chest is insufficient to enable it to meet current requirements. The development of some long-range program by which the organized Bar can contribute to a resolution of that problem is presently under consideration by our Legal Aid Committee.

[1] See CANONS OF PROFESSIONAL ETHICS, 4, 12; CAL. BUS. & PROF. CODE §6068(h).

In the meantime, there is one pressing need of the Foundation which the Bar can fill. The Foundation requires, for the proper accommodation of the thousands of persons whom it serves, additional furniture, office equipment and similar furnishings. Funds for acquisition of capital assets of this sort may be accepted by the Foundation from outside the Community Chest. Accordingly, your Board of Trustees has authorized the Legal Aid Committee to solicit our members for contributions to a fund of $5000 to be given to the Foundation for the acquisition of these items.

A letter requesting these contributions will be in your hands shortly, if it has not already been received. Your enthusiastic and generous response is needed. Such a response, it seems to me, is more than a matter of grace. It is a duty, since by it we perform vicariously the obligation which our professional standing imposes on us.

HERMAN F. SELVIN.

RESOLUTION

BOARD OF TRUSTEES
Los Angeles Bar Association
Adopted March 27, 1951

When ALEX W. DAVIS passed away on February 22, 1951, this community lost an eminent citizen, the Bar of California one of its foremost lawyers, and the Los Angeles Bar Association, a distinguished member. Born in Montana on August 12, 1892, he removed to Pomona, California, in 1907. He received his A.B. degree at Stanford University in 1914 and remained to graduate from the Stanford Law School with the degree of J.D. in 1916. He was a member of Phi Delta Phi and Theta Delta Chi and was honored by receiving the Phi Beta Kappa key.

Admitted to the California Bar in 1916, he chose Los Angeles as the scene of his legal endeavors and from that time forward his natural talents, combined with great industry and his sound legal training, claimed increasing recognition for him as an able lawyer. He achieved a high standing as one of the eminent members of his profession. He was a member of the legal firm of Mitchell, Silberberg and Davis and afterwards of the firm of Call, Murphey and Davis. After the dissolution of the last named firm, he established his own office and at the time of his death

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WHO SHALL BE CALLED TO THE BAR?*

By Homer D. Crotty**

Homer D. Crotty

LET us first examine the position of the lawyer in American society today. No other profession wields the power in our American life or has assumed greater responsibilities, than the legal profession. In our governmental division of powers, both with the Federal government and all of the states, the three branches include an enormous number of lawyers. All of the members of the judiciary, with rare exceptions principally in the lower magistrates' courts, are lawyers. The President of the United States, the Vice President and the Secretary of State are lawyers. Indeed, every president except one in the Twentieth Century has either been a lawyer or trained in law. The national congress and the legislatures over the country now have and for decades have had in them a greater percentage of lawyers than of any other calling. Moreover, many hundreds of administrative bureaus and law enforcement agencies, notably the Federal Bureau of Investigation, are manned with lawyers.

To turn from government to business, very large numbers of corporations are headed by lawyers or have boards of directors upon which many lawyers are serving. Then there are the thousands of lawyers who are on the payrolls of corporations, preparing their contracts, representing them before the courts and the innumerable agencies, and defending, settling or prosecuting claims on their behalf. More important are the active practitioners in the profession. While the public is accustomed mainly to think only of those lawyers who so spectacularly appear in the public press—such as Paul Stryker defending Hiss, or Frank Hogan defending Doheny—the great body of the profession is entrusted with the run-of-the-mill litigation and office practice. Nearly all of the property and contract relations of the citizen are affected in some way by what lawyers do or have done, and certainly most of those

*The following, in abbreviated form, is a report made for the Survey of the Legal Profession for the American Bar Association by Mr. Crotty.

**Mr. Crotty, a member of Gibson, Dunn & Crutcher in Los Angeles, is president of the State Bar of California for the current year.

who run afoul of the law meet lawyers who are ready to prosecute or defend them, and judges who will sentence or free them.

Does all of this mean that the country is in the hands of a lawyers' monopoly of public power? Does a lawyers' monopoly indeed exist? If all lawyers thought and acted alike and if all lawyers proceeded along the same lines of conduct and believed in the same political, economic and social theories, this accusation of a monopoly might well be true. What we have in the profession, however, is a very great number of individualists, not one of whom is prepared to accept without question all of the thoughts or beliefs of another. If anyone has any doubt about this he has only to submit a contract to a number of lawyers for their suggestions.

For what reasons does the practice of the law appeal to such a large number of persons? It is easy to see that the appeal to success in corporate life or in governmental positions which the lawyers have had in the past has given a tremendous impetus to study law. Formerly financial considerations had a considerable appeal. The young law student thought of the profession as a means to attain either a large fortune or a very substantial competence. The newspapers have played up the cases in which good sized fees are sought. With the tremendous increases in the incidence of federal and state income taxes on individual earnings, it is altogether unlikely that huge fortunes will ever again be accumulated by lawyers from fees. Like the professional in other fields—the opera, the movies and sports—the recipient of large personal earnings parts with a large share of his gains to the tax gatherer. Doubtless we shall never again see fortunes in the hands of lawyers to the extent accumlated by William Nelson Cromwell of New York, John G. Johnson of Philadelphia, or Garrett W. McEnerny of San Francisco.

What then are the actual qualifications which the bar and public are entitled to insist upon before any one shall be called to the bar? The public and the bar have the right to expect that the young lawyer who will be admitted to practice will be a person of good character, of ability, and of learning. They also have the right to expect that the recruits to the legal profession will be taken generally from the whole population and will not be confined to the sons of the wealthy or well-to-do.

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THE PENDENTE LITE HEARING IN DOMESTIC RELATIONS CASES**

By Mildred L. Lillie*

Mildred L. Lillie

MANY counsel appearing in the Domestic Relations Department are inclined toward the opinion that the court uses a definite measure in making awards and determining their amount and extent. The vast number and varied nature of matters subject to *pendente lite* orders in domestic relations cases, and the wide discretion exercised by our courts in their determination, do not make it possible to set up any single rule, or set of rules, that can be uniformly applied.

Although Orders to Show Cause re Modification, and Contempt are also heard in Department 8 of the Superior Court, this writing covers only Orders to Show Cause re Alimony *Pendente Lite*, Custody and/or Support of Minor Children, Attorney's Fees, Court Costs and Restraining Order.

Pendente lite proceedings are statutory in origin, existing only by virtue of Code provision; temporary in nature, effective only during the pendency of the main action to preserve the *status quo* of the parties; and are based upon the need of the petitioner and the ability of the respondent.

Temporary provision for alimony, custody and support of minor children, attorney's fees, costs and restraining order, pending trial of a divorce, separate maintenance or annulment action is made on Order to Show Cause following the filing of summons and complaint. The hearing thereon is usually set within two weeks, or ten days, if an *ex parte* restraining order is granted pending hearing.

The Order to Show Cause, together with the affidavit upon which it is based, and a copy of the form denominated "Husband's Questionnaire" must be served upon the party affected at least five full days prior to the date of hearing—three days if a restraining order is requested and time is shortened.

*Mildred L. Lillie is a judge of the Superior Court for Los Angeles County. Since July 1950 she has presided over Department 8 of that Court, the Domestic Relations Department. For a more complete biographical sketch, see 25 L. A. BAR BULLETIN 163 (February, 1950).

**This is the first of a series of articles to be published in the BULLETIN emphasizing an informative rather than a critical discussion of procedural matters.—ED.

The respondent, if he is the husband, should serve upon the petitioner at least two days prior to the date of hearing, a completed "Husband's Questionnaire," or an affidavit in answer to the Order to Show Cause.

If defendant has not yet appeared in the main action, service of the Order to Show Cause must be made by personally delivering a copy thereof to him within the State of California. If he has appeared by counsel, it may be served on his attorney of record, as any other motion. However, it is better practice to notify the respondent personally, and service upon him is the accepted procedure. If he has appeared in *propria persona* in the main action, and is residing outside the State, service may be accomplished by serving a copy of the Order to Show Cause on the County Clerk under Section 1015 of the CODE OF CIVIL PROCEDURE.

Although constructive service by publication of summons and complaint in an action for divorce, annulment or separate maintenance is valid, since the marital status is *in rem,* it does not constitute sufficient service of an Order to Show Cause for alimony *pendente lite,* child support, attorney's fees and court costs. The court is without jurisdiction to render a personal money judgment against a defendant not personally served, even though constructive service has been effected in the main action. An application for an order requiring defendant personally to do an act or pay money is one *in personam* and cannot be granted without personal service on him.

However, where defendant has neither voluntarily appeared in the main action, nor has been personally served with process, if the wife's verified complaint and affidavit show that she is entitled to a legal separation or divorce, alimony and a division of the community property; that her husband has left the state for the purpose of defeating her claims; that there is community property within the state of which he is endeavoring to dispose by fraudulent means, and she is in need of funds, the court can, during the pendency of the action, and upon a proper showing, appoint a receiver to take charge of the community property and direct him to pay alimony, child support, attorney's fees and costs out of the proceeds.[1] The court, by reason of its jurisdiction over the marital status and the property in the state, may not only order the re-

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[1]CAL. CIVIL CODE, Section 140 (1949); *Nichols v. Superior Court,* 1 Cal.2d 589, 36 P.2d 380 (1934); *Baldwin v. Baldwin,* 28 Cal.2d 406, 170 P.2d 670 (1946).

SOME SUGGESTIONS IN AID OF THE UNEXAMINED LAWYER

By George Harnagel, Jr.*

George Harnagel, Jr.

THE legislature has before it at this time a bagful of bills which would, in one way or another, facilitate the admission to the bar of former members of the armed forces. Some provide that certain classes of veterans may be admitted without taking the bar examination, some would lower the passing grade for veterans, and at least one would add 15 points to a disabled veteran's actual achieved grade in determining his qualifying grade.

Critics of such measures have frequently decried the tendency of the legislature to single out the practice of the law in its effort to lower professional standards for the veteran's benefit. The bill last mentioned should effectively silence that criticism for it is *not* limited to the legal profession. By its terms it would accord the 15 grade point disabled veteran's preference in any case where the successful completion of an examination is a condition precedent to the lawful undertaking of any business or profession. That would seem to take care of everyone from the physician and surgeon to the termite exterminator.

As far as I am aware no criticism has yet been directed at these bills on the ground that their benefits are limited to veterans, but should such criticism arise there is at least one measure, A. B. 1930, at which it could not fairly be leveled. Both legislatively neat and socially broad gauge, it would add an unobtrusive, decimal-pointed section to the Military and Veterans Code that would define "veterans" to include merchant seamen for the purposes of *any* law which confers "credits, benefits or privileges upon veterans."

Some of the severest criticism of these measures come from the veterans themselves, but as far as I can learn this is confined to those who are already admitted. I have not talked with anyone, veteran or non-veteran, not yet admitted to the bar who would not just as soon dispense with the examination.

*George Harnagel, a member of the BULLETIN Committee, is a member of McCutchen, Black, Harnagel & Greene of Los Angeles.

Some of this legislation seems unnecessarily half-hearted. For example it requires graduation from or attendance at an accredited school as a condition of admission without an examination. This will undoubtedly work a hardship on those who want to become lawyers (airplane pilots, cosmetologists, taxidermists, etc.) without the formality of professional training. Wouldn't it be better all around simply to provide that every veteran (merchant seaman, etc.) shall be deemed to have graduated from a duly accredited school of his choice. While we're at it let's do the generous thing and provide, in the case of the non-examined lawyer, that he shall be presumed to have served on the law review, or at least that his grades were such as to entitle him to a degree *cum laude*. This might prevent the unfortunate development of any class distinctions within the bar.

One argument usually advanced against legislation of this kind by veteran and non-veteran alike is that it would result in the admission of unqualified and incompetent practitioners. This, it is contended, is neither a kindness to the men so admitted nor to the members of the public who may employ them. It is felt that lawyers admitted without examination will be handicapped in competing with the presumably more qualified practitioners who have passed the bar examination and that the clients of the first group will suffer in consequence.

That argument, however, falls short of demonstrating that this type of legislation is unsound. Rather, it suggests that all we need is more legislation in aid of that already projected.

If the veteran, including the merchant seaman (and perhaps in time the longshoreman, the shipyard worker, the air raid warden and the blood donor), who is admitted to the bar without taking an examination, is going to be handicapped in competition with the members of the bar who have passed an examination, let the legislature do something about *that*. There are many things it can do to rectify this incipient inequity.

For example, it has been suggested that the legislature might provide that every lawyer who has not passed the bar examination shall be entitled to win three out of every five cases which he contests with lawyers who have passed the examination. Personally I think that is a little too direct and perhaps a little too rough on that section of the public which might misguidedly employ the

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RESOLUTION RE ALEX W. DAVIS

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was associated with attorneys Walter Bennett and William Paul Wood.

During the first World War, his professional career was interrupted by service in the United States Air Force and upon his discharge, he joined and rendered loyal service to the American Legion.

His natural aptitude for leadership attracted the attention of the organizations with which he became connected. He was honored with the presidency of the University Club of Los Angeles. In 1946 he was elected President of the Los Angeles Bar Association, on whose Board of Trustees he served from 1941 to 1946. Prior to his election to the presidency of the Association, he had a long career of service to that organization, in which his legal knowledge, habits of industry, and sound judgment were utilized over a long period of years in Association activities. He served either as chairman or a member of many of its committees, among which were, to name a few: Committee on Coordination on Work of All Committees, Committee on Revision of Constitution and By-Laws, Committee on Legal Education, Arbitration Committee, Committee on Radio Broadcasts, Committee on American Citizenship, Committee on Japanese Situation in the City of Los Angeles, Committee on Pleading and Practice, Committee on Judicial Selection and Tenure, and Committee on Lawyers Reference Service.

This long continued service evidenced qualities which he possessed in a high degree—industry, willingness to work, and loyalty. Loyalty to his clients, to the organizations which claimed him as a member, and to his own basic fundamental beliefs, was one of his outstanding traits. His long, valued services to the Los Angeles Bar Association will endure in the memory of all those who knew and worked with him.

NOW, THEREFORE, BE IT RESOLVED by the Board of Trustees of the Los Angeles Bar Association that they record their regret at the passing of ALEX W. DAVIS and extend their sincere sympathy to the members of his family.

RESOLVED, FURTHER, that this resolution be spread upon the minutes of the Association, published in the LOS ANGELES BAR BULLETIN, and a copy thereof be sent to his surviving daughter.

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By Earl C. Borgeson*

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*Mr. Borgeson is Assistant Reference Librarian, Los Angeles County Law Library.

**A more extensive, though still selected, bibliography of 106 items on this subject has been prepared by Mr. Borgeson and is available at the Law Library.

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WHO SHALL BE CALLED TO THE BAR

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First and foremost of these qualifications is the requirement that the applicant should have a good character. This is the hardest requirement of all for the bar examiners to determine, and their determination in most cases is based in reality on lack of evidence of bad moral character and not on affirmative proof of good moral character, notwithstanding that in most states it will be found that the applicant is required to present evidence of good moral character. In some jurisdictions elaborate procedures have been developed for personal interviews of applicants, and applicants are required to file letters of recommendation from persons who are not related to the applicant. It is a rare case when one of these references really is willing to disclose the information he knows might be detrimental to applicant's character. In the migration of lawyers between states there has grown up a practice of giving the departed member of the old bar a good sendoff in the hope that he will settle with the new and not come back. Such irresponsibility is a real detriment to the obtaining of proper character investigations.

Elihu Root, in the discussion relating to the accreditation of law schools at the Cincinnati meeting of the American Bar Association in 1922, stated:

> "I do not want anybody to come to the bar which I honor and revere, chartered by our government to aid in the administration of justice, who has not any conception of the moral qualities that underlie our free American institutions; and they are coming, today, by the tens of thousands.
>
> "I know of no way that has been suggested to assure to any real degree the achievement of such a view on the part of an aspirant to the bar except this suggestion that they should be required to go to an American college for two years and mingle with the young American boys and girls in those colleges, be a part of their life, and learn

> something of the community spirit of our land, at its best; learn something of the spirit of young America in its aspirations and its ambitions, seeking to fit itself for greater things. That is what they will get in an American college."[1]

This is merely one approach to the problem. In the early days of practice at the time when most study was in a law office, the preceptor was unquestionably familiar with the character of the man studying under him. This system has now become obsolete in most states. The preceptor was used not so much for the certification of the character of the new applicant as for his legal learning, and it has become altogether too evident that the education which an applicant receives in a busy law office is much inferior to that which he receives in a good law school.

This problem has been well stated by George Wharton Pepper, and I quote from his recent autobiography:

> "Those who are indifferent to public interest are relatively few and can readily be identified. Those seemingly incapable of grasping the conception of trusteeship are legion and they are the microbes, working in secret, who threaten the life of the bar. By 'trusteeship' I mean

[1] 8 American Bar Association Journal 114.

> the fixed principle that there *cannot* be any conflict of interest between the trustee and his beneficiary. The instant a question arises between them the trustee must yield. The instant that the attorney's interest becomes inconsistent with the client's, the attorney's interest must be forgotten. My guess is that a majority of the whole number of young men who come to the bar in our big cities think of the client as the merchant does of his customer. The two deal at arm's length and the young attorney proceeds on the vicious assumption that the client is quite able to take care of himself. The source of the evil should be sought in the young man's background and environment. Everybody admits that to secure a good trustee you must resort to a highly selective process. Few realize that to admit young men to the bar with no other than an educational test is to give a respectable and intelligent young fox easy access to the hen roost."[2]

Perhaps among the smaller bars in the country a standard of conduct can be expected and enforced by public opinion in a way which is not possible in the large metropolitan bars. The disciplinary proceedings can weed out the flagrant cases, but unless the courts are willing to sustain the action of the disciplinary authorities in proper cases, the whole system of enforcement of the ethics of the profession suffers badly.

No one should be admitted to the bar without an adequate prelegal and legal education. Fortunately this concept has made very great progress since the adoption in 1921 of the standards by the American Bar Association for the accreditation of law schools.

What then should be the requirement with respect to a prelegal education? A few years ago a study was made by Chief Justice Arthur T. Vanderbilt on prelegal education and was presented to the Section of Legal Education of the American Bar Association in 1944. This report sought the opinions of numerous judges, lawyers, law teachers and college authorities. The reports varied widely, but it is interesting to note the number of subjects which received the largest approving votes of the persons answering the questionnaire. They are, in the order of votes, the following: English language and literature, government, economics, American history, mathematics, English history, Latin, logic, philosophy, accounting, American literature, physics, modern history and sociology. These are the subjects receiving the highest votes, but

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[2]George Wharton Pepper, *Philadelphia Lawyer, an Autobiography*, 1944, pp. 342, 343.

numerous other subjects also were suggested.[3] The report concludes that in the prelegal education emphasis should be placed upon those courses which develop reasoning power and power of expression rather than merely the accumulation of information. In a number of replies it was stressed that so much depended upon the professor rather than the course chosen or, for that matter, the number of years in which the curriculum was pursued.[4]

Some of the expressions of the writers who have contributed to the making of the Report are so valuable as to point up the discussion upon this phase of prelegal education. The late Chief Justice Harlan F. Stone wrote:

> "I answer your first questions by saying that I have no doubt that in general members of the Bar should have much more prelegal education than is usually the case at the present time. But this does not necessarily mean that they should have more years of training or take more or different courses.
>
> "I think the usual college course is little enough prelegal training for the man who aspires to become a competent member of the Bar. But even that period of study does not necessarily mean that it will make him an educated man or properly qualify him to take up law study. Men who come to the Bar should be equipped to stand on their own feet intellectually, to do their own thinking, with developed capacity to exercise an independent and critical judgment, such as can come only from a considerable period of intensive study and intellectual self-discipline. This is not wholly a matter of years, of hours, or courses. It depends much more on the predilections of the student himself and the kind of training he has had, including his self-directed reading and thinking, quite as much as the courses he has taken and the number of hours or years he has spent in taking them. If his reading and study have been carried on under a guidance and with methods which incite his intellectual curiosity and develop his intellectual self-reliance, the result ought to be, in the case of those of fair mental equipment, that they leave college with the marks of an educated man, the inclination and trained capacity to form considered and enlightened judgments upon most of the problems involved in the art of living in civilized society. Whether

[3] *A Report on Prelegal Education*, by Arthur T. Vanderbilt, presented to the Section of Legal Education and Admissions to the Bar on September 12 and to the House of Delegates of the American Bar Association on September 13, 1944, and to the Association of American Colleges on January 11, 1945, pp. 32, 33.

[4] See also: John H. Wigmore, *Should the Standard of Admission to the Bar Be Based on Two Years or More of College-Grade Education? It Should.* 40 Reports of the American Bar Association 734 (1915).

> he will get this kind of intellectual experience in his classes in Hebrew, or in mathematics, or history, or economics, or a judicious selection from all, depends upon the man himself and the kind of guidance he gets in the courses he selects rather than his particular selection of subjects without reference to the manner in which they are given. Therefore it seems to me that in any statement you put out the emphasis should be put on the intellectual discipline which the student derives from courses and by particular teachers, rather than to the selection of particular subjects without reference to the way in which they are taught. If the student is so advised and has the intelligence needful to a good lawyer he may be depended upon to make the best use of the facilities which his college affords."[5]

Two years would seem to be an absolute minimum and is the period provided for by the accreditation rules. In view of the very complex problems which the lawyer must meet at the present time—far more complicated indeed than those facing the bar at the time the accreditation rule was adopted—consideration should be given seriously to the increase of this period, whether to three years or to the extent of getting a college degree, before admission is permitted in an accredited law school. The education of a lawyer should be both broad and deep. Unless he can have a thorough grounding in prelegal education before he studies law there is doubtless going to be very little time for him to develop such an education after he enters practice.

Because of the vast and extensive growth in college education, the junior college movement, the establishment of numerous state colleges and universities, it is no longer difficult for a poor boy to get a satisfactory college education at public expense, to say nothing of the numerous scholarships available at the privately endowed institutions.

What then should we consider to be an adequate minimum legal education?

At the outset of this discussion on what is an adequate minimum legal education, it is well to consider what happens to a lawyer who is poorly trained. Mr. William E. Reese, former president of the Federal Bar Association, has very aptly expressed it:

> "A poorly trained lawyer with a narrow outlook and a lack of basic prelegal knowledge is comparatively harm-

[5] *Report on Prelegal Education*, pp. 34, 35.
See Footnote No. 3.

> less in private practice, as he will automatically find his own level and remain there, or he will improve and broaden through contacts, further learning, and study; but once in the Government service, he may, through the aid of longevity—a proper factor for intelligent consideration—find himself in a position of authority over many lawyers. As an able man will surround himself with well trained and competent men, an ill-trained man often will favor those like himself, who he feels will not be able to excel him. Such a man will frown upon research and scientific effort, and will seek to discriminate against those under him who are trained in this field. He is particularly harmful in the position of General Counsel in a Government agency, first because he prevents the able man under him from serving the best interests of the Government; second, because he is responsible for opinions that partake of his limited viewpoint, thus affecting adversely the lives of citizens throughout the country; and third, because he may be instrumental in placing in line as his successor one whose qualifications are equally poor."[6]

The American Bar Association, in its rules for the accrediting of law schools, has provided that an accredited law school must require its students to pursue a course of three years duration if they devote substantially all of their working time to law studies, or a longer course equivalent in the number of working hours, if they devote only a part of their working time to their studies. This has been worked out practically to require a three-year course for law study if the school is a day school, and a four-year course if the school is a part-time night school. There can be no question from every standpoint that a better type of legal education is derived from a law school which meets the American Bar Association's standards for approval than from a substandard school. Preferably that education should be taken in a day school by a student who has a chance to devote substantially all of his time to it. There is the unfortunate practice of giving in the night schools—even those accredited by the American Bar Association—legal instruction which in most cases does not meet with the high standards available for the schools giving day instruction alone. In some law schools, of course, the same instructors give both day and night courses, but in too many other cases large reliance is placed upon the lay practitioner who is willing to give

[6] *Report on Prelegal Education*, p. 43. See Footnote No. 3.

part of his time to night course instruction. The crying need over all the country is for good part-time night schools which will meet the American Bar Association standards for accreditation, and will give part-time instruction of a quality at least equal to that available for daytime instruction.

The results of bar examinations throughout the country demonstrate that applicants who have studied law privately or in law offices alone, or by correspondence courses, or who graduate from schools not meeting the standards of the American Bar Association, fail overwhelmingly to pass the examinations. Such persons, if they really believed that their inferior educational programs fitted them properly for the practice of law, are only deceiving themselves. On the other hand, if they are convinced by substandard law schools, by correspondence courses, or in any other way, that they can get just as good a legal education in such ways they have made their decisions on fraudulent premises. The bar today is simply overcrowded with incompetent and ill-fitted lawyers who cheapen the quality of legal service. Anyone who visits the law and motion departments of our lower courts must be impressed by the low caliber of the representation which the clients are offered by poorly prepared lawyers. This problem will not

be alleviated in its most fundamental aspect until such time as the public insists upon proper law schools which meet at least the American Bar Association's standards.

No one should disagree with the fact that not every man or woman is fitted temperamentally or otherwise to become a lawyer. The sooner such persons are discouraged from continuing with their law study the sooner the incompetent and shiftless are eliminated from the law schools, and the better it will be for the public.

Lastly, before an applicant should be called to the bar, he should be required to pass a bar examination of standard quality. There is wide variation between the quality of questions included in the bar examinations of the different states. Some day a national bar examination could remedy this deficiency and propound questions of high grade so that applicants will be called upon to demonstrate by such national examination that they have the necessary legal learning and reasoning powers to discover the points in the question and to apply the principles of law to their solution. The diploma privilege which is still available to graduates in certain states and which was extended unnecessarily and unfortunately as a reward for the homecoming war veterans of World War II is a most inadequate substitute for the study and concentration needed to pass the bar examination. In those states where such diploma privilege exists there is no adequate pressure on the law schools to keep their instruction up to a high quality.

It is up to the bar itself to improve the standards for admission to the bar. The apathy within the bar, the opposition which has sometimes come from the law schools, and public indifference have very often plunged the subject of improving standards into politics. Then again we have the time-worn argument that Abraham Lincoln never went to law school, as well as the argument that the bar is a public profession and that attempts to improve standards will shut out poor persons of ability. Never was anything more fallacious. The public should insist that the poor person should not be short-changed in the quality of the education he gets. Far worse, on the other hand, is the public served if it permits the introduction into the ranks of the lawyers of the incompetent and poorly educated. In too many cases relatively high tuition is charged by poor night schools for indifferent work, when much better training is available at public expense from good law schools. An adequate legal education is not obtained simply by

absorption from a lawyer's surroundings. This same view was expressed by the Committee of the American Bar Association headed by Elihu Root, in urging the adoption of the accreditation rule in 1921:

> "But in recognizing the necessity for afternoon and evening schools we do not recognize the propriety of permitting such schools to operate with low educational standards. We should not license a badly educated man to practice law simply because he has been too poor to get a good education. On the contrary, the democratic necessity for afternoon and evening schools compels a lifting of these schools to the highest standards which they can be expected to reach."[7]

More often than not if a lawyer has never received a proper training to begin with, he will never take the time to remedy the defect in the future. For it is always well to remember that so long as a lawyer's soul is white he is not subjected to discipline unless incompetence is coupled with negligence or with some moral turpitude. I have been unable to find any reported case in which a lawyer has been disciplined for incompetence. In one case the California Supreme Court stated:

> "In other words, he must perform his duties to the best of *his individual* ability, not the standard of ability required of lawyers generally in the community. Mere ignorance of the law in conducting the affairs of his client in good faith is not a cause for discipline."[8]

The ignorance of a lawyer as to the rights of his client can erode and destroy the client's property just as effectively and as disastrously to the client as if the lawyer had stolen it. So it behooves the bar to overcome this apathy and to resist every attempt to lower standards as well as to be ever on the alert for an opportunity to improve the standards of the profession.

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[7] 46 *Reports of the American Bar Association* 685 (1921).

[8] *Friday v. State Bar*, 23 Cal. (2d) 501, 505 (1943).
The Florida Supreme Court has made this observation:
"It would be discriminatory and unfair to require the passing of an examination as a prerequisite to continuation in practice of those admitted to practice, either on a charge of lack of legal ability or as a condition to the resumption of practice after suspension. To impose that obligation upon those few attorneys who were so unfortunate as to have such a charge made against them, or have erred in their conduct, but not upon others, would result in destroying the dignity of the profession and undermining the confidence of the public therein."
Gould v. State of Florida, 127 So. 309, 313 (Fla., 1930).
See also:
In re Smith, 5 N. E. (2d) 27 (Ill., 1937).
The Supreme Court of New Hampshire has stated:
"This brings us to the question whether, in the present state of the law, mere ignorance of the law, however gross, can authorize the court to remove an attorney from practice. But how can a court possess this power, when the statute declares that any citizen, twenty-one years of age, and of good moral character, shall, upon application, be admitted to practice as an attorney? * * * And it is with a full conviction of the importance of preserving the standard of professional qualifications that we have been, nevertheless, constrained to come to the result, that ignorance of the law in an attorney does not authorize the court to suspend or remove him from office * * *."
Bryant case, 24 N. H. 149, 157 (1851).

SUGGESTIONS IN AID OF UNEXAMINED LAWYER

(Continued from page 328)

bar examination lawyer. Perhaps it would be fairer to equalize the opportunities of the two groups by making the following provisions in favor of the non-examined lawyer:

1. In all civil jury cases in the state courts he shall be entitled to a verdict by a 7 to 5 vote rather than the usual 9 to 3. Or the same thing might be arrived at in another way by providing that he be given a veteran's preference of 2 jurors. In the federal courts, where the rule of unanimity prevails, the Judicial Code might be amended to provide that a vote of 10 to 2 in his favor shall be deemed to be unanimous. Of course, this might raise a constitutional question under the Seventh Amendment, but let's not cross that bridge until we have to.

2. In any argument before or appeal to a court consisting of three or more judges, the non-examined lawyer shall be spotted one judge.

3. Wherever the law accords a specified number of preemptory challenges, the non-examined lawyer shall have one additional preemptory challenge for every year of service in the armed forces, the longshoreman's union, etc.

4. Wherever the law provides that a pleading shall be filed, a motion made, an appeal taken, or any other procedural step accomplished within a specified number of days, let the non-examined lawyer have 15 days additional.

5. Wherever a rule of court limits the length of a brief to a specified number of pages, add 15% for the non-examined lawyer and waive the requirement for double spacing.

6. Wherever a statute or rule permits one amendment of a pleading as of course, give him two.

7. Amend the Code of Civil Procedure to make objections based on the hearsay rule unavailable as to 15% of the questions which he asks of any witness.

8. Amend the Civil Code to provide that where any written instrument is prepared by a non-examined lawyer, any ambiguity therein shall be resolved in favor of his client.

9. Amend Article XX, Section 9, of the state constitution to provide that no will or trust drawn by an unexamined lawyer shall be deemed to violate the rule against perpetuities unless it's a particularly bad violation.

This list is, of course, merely suggestive. Many similar measures will occur to any alert legislator and can be added from year to year as they are needed.

PENDENTE LITE HEARING

(Continued from page 326)

ceiver to take possession of the property, but to sell the same, if necessary, and make payments out of the proceeds.

Since the appointment of a receiver under these circumstances is necessarily *ex parte* in nature, care should be taken, in preparing the verified complaint or affidavit supporting the application, to comply with Rule 25 of Rules for Superior Court. The property for which a receiver is requested should be listed with particularity, with the names, addresses and telephone numbers of the persons in possession thereof and a description of the use being made of the same. If the property is a part of any business, its nature, size and extent should be set out in detail, together with facts showing whether its sequestration would stop or seriously interfere with its operation.

Within ten days after his appointment, the receiver shall file an inventory containing a complete list of all property taken into his possession.[2] Unless it reflects his actual or constructive possession of the property, the order requiring him to pay funds out of it or the proceeds thereof will be of no effect.

Similar to the remedy existing under Section 140 of the Civil Code, a wife may receive further protection by recording a home-

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[2]RULES FOR THE SUPERIOR COURTS, Rule 27(c).

stead on the family residence. A wife who continues to occupy the premises as her home, whose husband has deserted her and failed to provide her with the necessaries of life, may record a homestead on the residence of the parties even though it constitutes his separate property. The trial court may assign it to the innocent wife for a period not to exceed her natural life.[3]

The petitioner must file with the Order to Show Cause a completed questionnaire in affidavit form. This is jurisdictional and without it the court cannot proceed. Although it is better practice for respondent to file a completed "Husband's Questionnaire" or affidavit in answer to the Order to Show Cause, it is not a jurisdictional requirement.

The Affidavit in support of the Order to Show Cause must allege facts sufficient to give the court jurisdiction to proceed *pendente lite* and, if proved, to permit the court to make a ruling on the merits of the application. Although there must have been a prior complaint filed to give the court jurisdiction over the marital status, a complaint stating a good cause of action is not always a prerequisite to a *pendente lite* award. For instance, an application for temporary alimony and suit money made in good faith is proper even though a demurrer to the complaint has been sustained and no amended complaint is yet on file, if the time for amendment has not expired.[4] The only requisite to the court's exercise of discretion in making an award is that such order be made when an action for divorce or separate maintenance is pending.[5]

An application by way of Order to Show Cause for alimony *pendente lite*, child support, custody, attorney's fees, court costs and restraining order is an independent collateral proceeding and an appeal lies from the court's determination thereon. Because of its independent status, the affidavit supporting the Order to Show Cause must be complete in itself, and the complaint, or other verified pleadings on file, cannot supply whatever requisites are lacking. Care should be taken to allege facts sufficient to reflect a valid and existing marriage between the parties to the action;

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[3]*Greenlee v. Greenlee*, 7 Cal.2d 579, 61 P.2d 1157 (1936).

[4]*Heller v. Heller*, 88 Cal.App.2d 603, 199 P.2d 44 (1948).

[5]*Thomas v. Thomas*, 66 Cal.App.2d 818, 153 P.2d 389 (1944).

the need of the petitioner, and respondent's ability to comply with the order prayed for.

If, at the time of the hearing on the Order to Show Cause, respondent fails to appear, petitioner, upon proof of service, may proceed in his absence. Often counsel will request the issuance of a bench warrant for the defaulting party. Since the Order to Show Cause is civil in nature, and the respondent may elect to appear or default as he sees fit, no bench warrant will be issued unless in addition thereto, counsel has served on him a valid subpoena upon which he has failed to appear.

At the hearing on the Order to Show Cause the accepted rules of evidence relating to the use of affidavits are followed. The affidavit of a third person, such as a doctor or employer, is clearly hearsay and inadmissible, but in an effort to expedite matters, most attorneys will permit a doctor's affidavit to be used rather than incur the expense and take the time to call medical witnesses. However, if counsel is unwilling or unable to cooperate to this extent, a practical solution lies in a letter directed to the doctor embodying questions of both counsel, and a stipulation that the reply may be used in evidence. The affidavit of a party present in court may be received in evidence since the affiant is available for cross-examination or further questioning. The problem arising out of an offer in evidence of the affidavit of a non-resident wife is often solved by ordering the husband to pay her expenses in attending the hearing or the cost of her deposition, preferably by interrogatories.

The court, on a *pendente lite* application for alimony, is not concerned with the merits of the main action. The only question is whether the application is made in good faith. Neither the order nor the court's findings on the application are *res judicata* and the trial court is not bound by an award or denial thereof.

In an action for divorce or separate maintenance the existence of a valid marriage is a condition to an award of temporary support, costs and counsel fees.[6] The parties to an illegal and void—bigamous or incestuous—marriage are not entitled to alimony. The existence of a valid marriage may be questioned at any stage of the proceeding prior to the decree.[7] The validity of a

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[6]*Talbot v. Talbot*, 218 Cal. 1, 21 P.2d 110 (1933).

[7]*Parmann v. Parmann*, 56 Cal.App.2d 67, 132 P.2d 851 (1942); *In re Cook*, 42 Cal.App.2d 1, 108 P.2d 46 (1940).

marriage alleged in the affidavit supporting the Order to Show Cause is presumed from a showing of a ceremonial marriage, and the burden of proving otherwise is on the contestant.[8] The showing necessary to establish its validity need not be as complete and satisfactory upon a *pendente lite* hearing as at the time of trial on the merits,[9] and the court's findings and order thereon are not binding on the trial court. Actually, the issue is litigated more than once.

The purpose of alimony *pendente lite* under Section 137 of the Civil Code is to enable the petitioner to live in the manner established by the parties during marriage pending disposition of the main action. The amount of award is entirely discretionary with the court. Contrary to what many counsel suspect, there is no percentage used by the court in fixing support. The basic policy is to make the award as reasonable to both parties as possible under all the circumstances. Actually, unless the award is a rea-

[8]*Marsh v. Marsh*, 79 Cal.App. 560, 250 Pac. 411 (1926); *Immel v. Dowd*, 6 Cal. App.2d 145, 44 P.2d 373 (1935).

[9]*Colbert v. Colbert*, 28 Cal.2d 276, 169 P.2d 633 (1946).

sonable one, the party receiving it faces the often difficult problem of collecting it. From a practical standpoint, it is far better for counsel to obtain for his client a conservative award, which generally guarantees continuous full payments on time, than a more adequate sum, which results in partial or entire failure of compliance. The cost and aggravation to the petitioner in trying to collect is sometimes much greater than the sums finally collected.

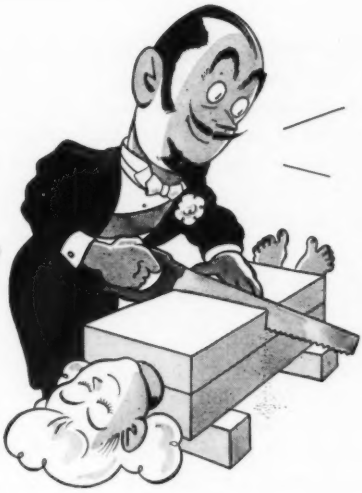
The court, in exercising its discretion to determine petitioner's need and respondent's ability to pay, considers many factors. Generally, they consist of the respective ages of the husband and wife and their state of health; the financial worth and resources, property and income of both; the ability of each to earn a living; the ages and number of children to be cared for by the wife; the standard of living established by the parties during marriage; the necessary monthly living expenses of each; and the duration of the marriage. In determining the ability of respondent, the court is not bound by the amount of his actual earnings but can consider his ability to earn money by use of reasonable effort.[10]

Although there is authority permitting the trial court to award alimony even though no award is requested or made *pendente lite*, the safe and customary practice in a case in which petitioner is presently not in need, and/or respondent is unable to pay, is to apply *pendente lite* for a nominal award. This leaves the petitioner in a position to ask for an increase at some future time before trial or for a substantial award at the time of trial, if the circumstances permit. If the right is originally established *pendente lite*, jurisdiction continues until final determination on the merits.

No order *pendente lite* may be made awarding property—division thereof can be effected only after final determination of the rights and obligations of the parties on the merits. Many counsel, before the hearing on the Order to Show Cause, are able to effect an out of court settlement of all the property rights of the parties by way of oral or written stipulation. Such agreement usually consists of a full settlement including division of property. Counsel often request an order *pendente lite* incorporating all of its terms, pending approval of the agreement by the trial court. This is proper as long as the provisions thereof strictly relate to matters

[10] *Webber v. Webber*, 33 Cal.2d 153, 199 P.2d 934 (1948).

No Hocus Pocus...



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of a temporary nature, but no order *pendente lite* will be made which finally determines and disposes of the rights of the parties. Although the stipulation or agreement may be filed and made a part of the record in order to bind the parties in the future, the court will not make a long term alimony award or order a permanent division of property during the pendency of the action. However, the court can award exclusive use and possession of property pending trial.

Often these same property settlement agreements contain provisions for payment of a lump sum to a wife and minor child for their support. These amounts should be segregated so that a definite allocation is allowed to each person. Where none is made, some courts at a later date, on modification or contempt, will refuse to determine what amount should have been paid for the support of each in the past.[11] The problem becomes serious when an application is made to reduce the lump sum by reason of remarriage of the wife, or majority or death of a child.

Frequently counsel requests the court to order respondent to pay directly to the doctor or hospital reasonable and necessary medical or hospital bills to be incurred in the future for petitioner or the children. Such an order merely gives a doctor or the hospital a civil lawsuit. It is doubtful that the court has power to punish by way of contempt a failure to make payments directly to a third party. Unless statutory provision exists therefore, payments for the benefit of petitioner should not be made to third persons, but directly to the plaintiff or through the court trustee.[12] The usual method of handling such a situation is to cause payments of a sum certain to be made to the court trustee, for the benefit of the plaintiff or the minor children, to be applied in a stated manner.

An award of alimony *pendente lite* may be enforced directly—by execution;[13] or by way of contempt (even though there be a subsequent dismissal of the main action by the plaintiff respondent pending an Order to Show Cause for failure to make payments accruing prior to dismissal);[14] and indirectly—by requiring re-

[11] *Hale v. Hale*, 6 Cal.App.2d 661, 45 P.2d 246 (1935); *Parker v. Parker*, 203 Cal. 787, 266 Pac. 283 (1928).

[12] *Sharon v. Sharon*, 75 Cal. 1, 16 Pac. 345 (1888).

[13] CAL. CODE OF CIV. PROC., Section 681 (1949); CAL. CIVIL CODE, Section 137 (1949); *Lohman v. Lohman*, 29 Cal.2d 144, 173 P.2d 657 (1946); *Di Corpo v. Di Corpo*, 33 Cal.2d 195, 200 P.2d 529 (1948).

[14] *In re Robbins*, 109 Cal.App. 363, 293 Pac. 96 (1930).

spondent to deposit security for payment, or by impressing a lien on his property,[15] or by preventing entry of a final decree of divorce by a party wilfully in default, even though there has been no prior adjudication of contempt and none is sought.[16]

The right to an award of attorney's fees, and the enforcement thereof, are conferred by statute and regulated by Code provision.

In annulment proceeding attorney's fees and costs are allowable subject to the provisions of Section 87 of the Civil Code. To determine whether the party seeking the award is entitled to the same, a limited hearing on the merits *pendente lite* is justified.

Attorney's fees and court costs in divorce and separate maintenance actions are provided by Section 137 of the Civil Code. An award may be made in custody proceedings as well,[17] although none is allowable in independent actions for division of community property.

As to the time of obtaining an award, it appears that a *pendente lite* application should be made, because of the general rule that the court may not award attorney's fees for services already rendered. The reasoning therefor is based on the theory that to justify an award the court must find a necessity,[18] and none can exist where legal services have already been furnished.[19] There is authority to the effect that the court can, on *pendente lite* hearing, order respondent to pay petitioner attorney's fees, the amount and manner of payment to be determined at the time of trial.[20] However, such an order requires counsel for the wife to look to the husband's credit in performing legal services for her, pending trial.

The easiest and most practical solution lies in a *pendente lite* stipulation, either oral, in open court, or in writing and filed with the Clerk, that the balance or total amount of fees may be fixed at the time of trial. The parties may properly consent to such an award of fees after rendition of services for such a stipulation waives the objection that an allowance of attorney's fees may not

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[15]CAL. CIVIL CODE, Section 140 (1949); *Smith v. Smith*, 49 Cal.App.2d 716, 122 P.2d 346 (1942).

[16]*Knackstedt v. Superior Court*, 79 Cal.App.2d 727, 180 P.2d 375 (1947).

[17]*Sharpe v. Wesley*, 78 Cal.App.2d 441, 177 P.2d 802 (1947).

[18]*Mudd v. Mudd*, 98 Cal. 320, 33 Pac. 114 (1893).

[19]*McClure v. Donovan*, 86 Cal.App.2d 747, 195 P.2d 911 (1948); *Lacey v. Lacey*, 108 Cal. 45, 40 Pac. 1056 (1895).

[20]*Thomas v. Thomas*, 66 Cal.App.2d 818, 153 P.2d 389 (1944).

be made for past services. This permits the trial court to consider all of the services rendered in fixing the amount.[21]

As to the amount of the award, it is largely within the discretion of the court.[22] Factors such as the need of petitioner for funds to pay counsel, respondent's ability to pay them, the amount and value of property involved, the amount and kind of legal services to be rendered in the future, and the professional standing of counsel, may be considered by the court. The run-of-the-mill default case today warrants a fee of around $125.00 to $150.00. Although respondent's large income and extensive property holdings constitute an important circumstance to be considered by the court in awarding a substantial fee, such condition alone will not justify one.

Actually, the burden is upon counsel to make a showing sufficient to justify a large award. In the absence thereof, one will not be made just because the respondent can afford it.

Necessity for additional legal work in preparing the case for

[21] *Line v. Line*, 75 Cal.App.2d 723, 171 P.2d 733 (1946).
[22] *Stewart v. Stewart*, 156 Cal. 651, 105 Pac. 955 (1909).

trial, consisting of—investigations; depositions; conferences; legal research; audits; drawing agreements and legal documents; and retaining specialists, experts, or co-counsel to aid in preparing for the actual trial, are all circumstances material to the amount of attorney's fees and costs allowable. The court also may inquire into the type and extent of counsel's practice, his yearly income therefrom, and his standing in the profession.

Under Section 137.5 of the Civil Code attorney's fees may be awarded directly to the attorney. Such an order constitutes a judgment in favor of the attorney, which he may enforce by execution.[23] The case of *Weil v. Superior Court*[24] appears to prevent an attorney, on his own behalf by way of contempt, from enforcing an order for attorney's fees payable directly to him. However, a party may, on behalf of his or her attorney, prosecute a contempt proceeding to compel a defaulting respondent to pay attorney's fees and costs, where the award is made payable directly to the party.

An indirect method of enforcing an order for fees is by motion to prevent a plaintiff respondent from proceeding further in his main action until he complies. Also, an appellant who has defaulted on an order to pay attorney's fees and costs on appeal may be deprived of his right to appeal until he pays, regardless of whether or not he has the ability.[25]

Restraining orders are generally sought on a *pendente lite* hearing. As to point of time, they fall into two categories—pending hearing on the order to show cause, and pending hearing on the main action. As to subject matter, they fall into as many categories as there are types of conduct inimical to a final, fair and equitable disposition of the rights and obligations of the parties.

Regardless of the kind of a restraining order prayed for, the petitioner in making application for the same must comply with Section 527 of the Code of Civil Procedure relating to injunctions generally, by submitting a verified pleading or affidavit showing sufficient grounds to exist therefor. It is well settled that an application for injunctive relief in an action for divorce or separate maintenance is governed by this provision,[26] and that compliance therewith is a procedural prerequisite to the granting

[23] *Weil v. Weil*, 100 Adv.Cal.App. 568, 224 P.2d 471 (1950).
[24] 97 Cal.App.2d 373, 217 P.2d 975 (1950).
[25] *Kopasz v. Kopasz*, 34 Cal.2d 423, 210 P.2d 846 (1949).
[26] *McDonald v. Superior Court*, 18 Cal.App.2d 652, 64 P.2d 738 (1937); *Harlan v. Superior Court*, 94 Cal.App.2d 902, 211 P.2d 942 (1949).

of a restraining order. One might well believe that a restraining order in a domestic relations case should be granted regardless of strict compliance with Section 527 on the theory that the court in an equitable proceeding has inherent power to preserve the rights of the parties pending trial. The decisions, however, hold otherwise. In analyzing the problem it would appear that the requirement of full compliance with Section 527 fails to take into consideration the actual realities of family disputes. It is seldom that either spouse, in advance, threatens to dispose of property or remove the minor child from the jurisdiction of the court or do any other act prejudicial to the rights of the other. In any event, it is now clear that the affidavit supporting the Order to Show Cause, or a verified pleading, must contain sufficient facts to justify the restraint prayed for, and a continuing necessity for the same, together with points and authorities in support thereof. For instance, except upon a clear showing of threat of, or actual physical injury or destruction of property, neither party can be removed from the family residence during the pendency of the action.[27] Therefore, before the court will hear the Order to Show Cause re restraining order preventing the respondent from remaining on the premises, the affidavit in support thereof must set out such facts. Although much can be said for the theory that if a divorce is pending, the parties should separate entirely, and live apart, economic circumstances often justify joint physical occupancy of the family dwelling pending the hearing on the merits.

On rare occasions a request is made to restrain one party from obtaining a divorce in a foreign state during the pendency of the action filed in this County. To this writer's knowledge no reported California case deals directly with this problem. However, the following authorities lend support to the theory that such a restraining order may be proper.[28] The material question, of course, is whether or not the foreign state has jurisdiction to proceed. An interesting decision is found in *Dandini v. Dandini*,[29] relating to the propriety of issuing an injunction against bigamous marriage.

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[27] *Smith v. Smith*, 49 Cal.App.2d 716, 122 P.2d 346 (1942); *Luitwieler v. Luitwieler*, 57 Cal.App. 751, 207 Pac. 931 (1922).

[28] *Streitwolf v. Streitwolf*, 181 U.S. 179; *Usem v. Usem*, 136 Me. 480, 13 A.2d 738; *Peff v. Peff*, 134 N.J.Eq. 506; *Perlman v. Perlman*, 13 N.J.Eq. 3; *Selkowitz v. Selkowitz*, 179 Misc. 608, 40 N.Y.S.2d 9.

[29] 86 Cal.App.2d 478, 195 P.2d 871 (1948).

The matter of custody of minor children is statutory. Under the common law a father was the legal custodian of his child. In California in an action for divorce, separate maintenance, annulment, or other proceeding in which custody is involved, Section 138 of the Civil Code provides that as between parents, the court shall be guided by the best interest of the child in respect to its temporal, mental and moral welfare.[30] The trial court has extensive discretion with a view to conserving the highest and best interests of the minor.

As between parents, custody is no awarded out of consideration for the rights or desires of either, nor for the purpose of rewarding or punishing either parent. Their rights and privileges are secondary to the childr's welfare.

All other things being equal, "if the child is of tender years, it should be given to the mother; if it is of an age to require education and preparation for labor or business, then the father."[31]

The law permits the court to consider the child's preference,

[30] *Noon v. Noon*, 84 Cal.App.2d 374, 191 P.2d 35 (1948).
[31] CAL. CIVIL CODE, Section 138. See also *Loomis v. Loomis*, 89 Cal.App.2d 232, 201 P.2d 33 (1948); *Bemis v. Bemis*, 89 Cal.App.2d 80, 200 P.2d 84 (1948).

where it is of sufficient age to form an intelligent one. Where a contest exists, it is the court's policy to talk to the child in Chambers, away from parents, attorneys, or any disrupting influence. In this manner the court can usually gain some insight into the child's intelligence, character, personality and family background; the progress of the child in school, and his association with other children and the teachers; his relationship with his parents and attitude toward parental authority; his need for supervision; what he thinks of each parent, and his desires in the matter. Even in cases in which the child is old enough to form an intelligent preference, the court will not always abide by his wishes if the net result is not beneficial to his welfare.

Custody taken from the mother under Section 138 of the Civil Code is determined solely from the child's standpoint. The court may consider, among other things, the financial condition of each parent, their individual interests and attitudes, the morals and disposition of each, and their ability to supervise the child and care for his physical and emotional needs.[32]

The burden of proving unfitness of a parent falls on the contestant. It is not always easy to sustain. The conduct complained of may well offend the court, or the other spouse, or even the public generally, but to render a parent unfit it must adversely and directly affect the welfare and the best interest of the child as to his mental, temporal or moral welfare.[33]

Agreements between a husband and wife regarding custody and support of minor children are not binding on the court and can be disregarded. Often counsel will seek the court's approval of a stipulation, changing custody of a minor from one parent to the other. It has always been the court's policy to withhold such approval until it has been fully apprised of the reason for the purported change, the circumstances justifying the same, whether the child will be properly cared for in the future, and the free and voluntary nature of the consent of the parent losing custody. If it should appear to the court that a personal situation exists between the parents which is responsible for the change, and that such a change may be prejudicial to the welfare of the child, the court's approval will be withheld. Therefore, whenever such a

[32] *Taber v. Taber*, 209 Cal. 755, 290 Pac. 36 (1930); *Hue v. Pickford*, 96 Cal.App.2d 766, 216 P.2d 128 (1950).

[33] *Washburn v. Washburn*, 49 Cal.App.2d 581, 122 P.2d 96 (1942).

stipulation is presented for action by the court, counsel should be prepared to present sufficient facts by way of the parties themselves, witnesses, or affidavit, to show a justification for the purported change and the reasons therefor.

In the absence of express prohibition, an order awarding sole custody to a mother, but silent on rights of reasonable visitation, implies such right.[34] This is based upon the theory that the right is inherent in the natural relationship of parent and child, and that it need not be artificially created by the court. In the interests of the child, the court scrupulously protects visitation rights of the parent not having custody. However, there are circumstances which will justify a denial of visitation privileges because of the deleterious effect on the welfare of the child, but the showing of prejudice must be strong. Ordinarily, the court will not refuse a parent, who is in default of payments for child support, the right to exercise visitation privileges, on that ground alone.

A third person has no right to visit a child and this applies to grandparents, who cannot do so without the consent of the parent having custody.[35]

Restraint against the parent having custody to prevent him from removing the child from the state is improper unless it is ordered pursuant to stipulation of the parties, or unless the court has made an affirmative finding that such removal is prejudicial to the rights or the welfare of the child.[36] This is based on the reasoning that the one entitled to custody has the right to name any reasonable place to which the child shall go or live as long as it remains with that parent.[37]

The doctrine of "parental right" is followed in this jurisdiction in cases in which the contest is between parents and a third party. A minor will not be awarded to a third person unless the court affirmatively finds both parents unfit, regardless of the child's best interests or the qualifications of the third person.[38] The grandparents are considered strangers to the child in a contest involving

[34]*Exley v. Exley*, 101 Adv.Cal.App. 954, 226 P.2d 662 (1951).

[35]*Odell v. Lutz*, 78 Cal.App.2d 104, 177 P.2d 624 (1947).

[36]*Shea v. Shea*, 100 Adv.Cal.App. 62, 223 P.2d 32 (1950).

[37]*Luck v. Luck*, 92 Cal. 653, 28 Pac. 787 (1892); *Heinz v. Heinz*, 68 Cal.App.2d 713, 157 P.2d 660 (1945).

[38]*Becker v. Becker*, 94 Cal.App.2d 830, 211 P.2d 598 (1949); *Eddleman v. Eddleman*, 27 Cal.App.2d 343, 80 P.2d 1009 (1938); *Stever v. Stever*, 6 Cal.2d 166, 56 P.2d 1229 (1936).

one or both parents. In fact, an award giving one parent legal custody and physical custody to a grandparent is improper, unless the parties stipulate to such an order, or unless the court affirmatively finds that both parents are unfit. The person entitled to legal custody is likewise entitled to physical custody, if he is fit.[39]

Helpful to the court in determining child custody and visitation matters, is a staff of qualified, unbiased, and experienced investigators who work out of Department 8 and are directly responsible to this court. Their work in the field consists of inspecting homes without previous notice, interviewing witnesses, observing supervision, care and affection the child is receiving in his home, and inquiring at school, church and in the neighborhood regarding the child's behavior and ability to get along with others.

The purpose of legislation providing for court assistants in the capacity of investigators is to assist the court in the transaction of its judicial business.[40] Ordinarily an investigator will not be appointed except upon stipulation, in which case in order that her report may be used by the court, counsel must further stipulate that

[39] *Shea v. Shea*, 100 Adv.Cal.App. 62, 223 P.2d 32 (1950); *Roche v. Roche*, 25 Cal.2d 141, 152 P.2d 999 (1944).

[40] CAL. CODE OF CIV. PROCEDURE, Section 261 (1949).

the investigator's report may be received in evidence, subject to the right of either party to cross-examine adverse witnesses, offer additional evidence, and call the investigator for questioning.

It would appear from the authorities that if the court appoints an investigator in the absence of a stipulation, her report cannot be used in evidence because of its hearsay nature.[41] In such a case, however, the investigator may testify to what she observed and to any admissions made by the parties; but she cannot relate hearsay. A parent is entitled to a legal hearing, the right to present evidence and cross-examine witnesses, and the court cannot, over the objection of one or both parties, determine the matter of custody or visitation on the report of the investigator alone. The court must hear evidence, if it is offered.[42]

The investigators are forbidden to report secretly or privately to the judge and a copy of the report is furnished to each counsel at least five days prior to hearing so that they may be prepared to put on additional evidence if they so desire.

Many counsel come into court in custody proceedings unprepared for hearing, relying upon their private stipulation that the court may appoint an investigator and continue the matter for thirty days. In doing this, they take the chance of being faced with a hearing unprepared if the court refuses to approve such a stipulation. The court will not appoint an investigator in every case in which counsel have so agreed, but only in those situations in which an investigation is necessary and proper. The primary function of an investigation is to aid the court and not counsel. It cannot be used to avoid a lengthy hearing, or to relieve counsel of the responsibility of finding the facts and preparing his case for hearing. But if it appears that the issue of fitness may have been created by alleged immoral conduct or neglect, the court will order an investigation and continue the hearing for not more than thirty days for the return of the report. The investigator's job is to find the facts and report them to the court. Her conclusions and recommendation are based upon the facts and circumstances as she finds them and on her long experience in handling custody matters. She is not trained in psychiatry or medicine and for emotional, personality, psychiatric or medical problems, an expert should be called in.

[41] *Fewell v. Fewell*, 23 Cal.2d 431, 144 P.2d 592 (1943).

[42] *Washburn v. Washburn*, 49 Cal.App.2d 581, 122 P.2d 96 (1942); *Noon v. Noon*, 84 Cal.App.2d 374, 191 P.2d 35 (1948).

A great many Orders to Show Cause are heard by commissioners, who sit as referees to make factual findings and recommendations. After hearing, the commissioner announces his recommendation orally and prepares written findings and recommendation the same day, which recommendation is signed by the court and constitutes a valid order. The findings must be legally sufficient to support the recommendation and subsequent order. If either side is dissatisfied with the commissioner's findings and/or recommendation, he may file exceptions in the form of a motion to be heard in Department 8. It must be filed in this department within five days after notice of the making of such order, and shall be set for hearing within ten days after date of the order. If notice is waived at the hearing, the motion must be filed within five days after the order is signed. However, between the time the order is signed and the exceptions heard and finally determined by the court, the order remains in full force and effect and continues to run as a valid one unless a stay is obtained.

There is no particular form to be used and the Code fails to specify any grounds for exception. The court will entertain the motion as long as there is sufficient information therein to put the adverse party on notice of the complaint and the reason therefor. The customary grounds are: the findings are unsupported by the evidence; the recommendation is unsupported by the findings; errors were committed in admission or rejection of evidence or in the interpretation or application of the law.

The hearing on the motion does not constitute a trial *de novo*. Usually no evidence is taken. In determining the motion, the court will not substitute its judgment for that of the commissioner. If the motion is denied, the order is confirmed and the remedy is appeal—if granted, the order is usually vacated and the matter set down for *de novo* hearing. If the findings are not attacked, the court may vacate the order and enter another one on the same findings, or may correct a portion of the order. Additional evidence is rarely taken on the motion although in the court's discretion it may be if only a single factual point is involved.

No matter how you view the Order to Show Cause, legal consolation is found in the proposition that any finding or conclusion made by the court *pendente lite* is only temporary in nature and in no way binding on the trial court later hearing the matter on the merits.